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STATUTE CITED:

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1946**

**No. 988.**

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AMBASSADOR MANAGEMENT CORPORATION, MILTON M.  
FISCHER and RUDOLPH BAUER, as Executors under  
the Last Will and Testament of Gisela Bauer,  
Deceased, and 239-241 FULTON AVENUE COR-  
PORATION,

*Petitioners,*

—against—

INCORPORATED VILLAGE OF HEMPSTEAD,

*Respondent.*

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**BRIEF FOR RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI.**

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**Facts.**

The Board of Trustees of the Village of Hempstead pursuant to Article 14 of the Village Law of the State of New York duly instituted proceedings to condemn certain lands for a parking place.

The petitioners herein do not question the fact that such proceedings were taken pursuant to said Article 14 of the Village Law nor do they question the fact that all things required by said Article 14 were done by the Village; including the giving of all notices provided for under said article.

The first cause of action herein relates to the land shown on Map No. 6R 234 and the third cause of

action relates to the land shown on Map No. 6D 234A. The other causes of action set forth herein also refer to amounts of assessments paid by the petitioners as a result of the same condemnation proceedings.

The total cost of acquisition including all expenses for the land shown on Map No. 6R 234 was \$404,537.15.

The total cost of acquisition including all expenses for the land shown on Map No. 6D 234A was \$42,772.76.

Commissioners of Estimate were appointed in regard to Map No. 6R 234 by an order of the County Court of Nassau County duly made June 11, 1941, and entered on June 12, 1941, and the final report of said Commissioners of Estimate was duly confirmed by an order of said County Court made and entered on July 19, 1943.

A Commissioner of Assessment was duly appointed by an order of the County Court of Nassau County made on June 11, 1941, and entered on June 12, 1941, and the final report of said Commissioner of Assessment was confirmed by an order of said County Court made and entered July 19, 1943.

As to the land shown on Map No. 6D 234A Commissioners of Estimate were duly appointed by an order of the County Court of Nassau County dated April 20, 1942, and entered on April 21, 1942, and the final report of said Commissioners of Estimate was confirmed by an order of said County Court duly made and entered on August 2, 1943.

That as regards Map No. 6D 234A a Commissioner of Assessment was duly appointed by the order of the County Court of Nassau County dated April 20, 1942, and entered on April 21, 1942, and the final report of said Commissioner of Assessment was duly confirmed by an order of said County Court made and entered on August 2, 1943.

None of such orders or judgments of the County Court of Nassau County have ever been modified, vacated, or reversed, and no appeal is pending therefrom, and no application has ever been made to the County Court of Nassau County to modify or vacate said orders or judgments or any of them.

On March 19, 1945, petitioners commenced this equity action in the Supreme Court, Nassau County, to vacate and set aside the assessments made pursuant to the judgments of the County Court of Nassau County.

Petitioners' complaint was dismissed by the Supreme Court, Nassau County, petitioners appealed to the Appellate Division of the Supreme Court which affirmed the decision of the Supreme Court, petitioners thereupon appealed to the Court of Appeals of the State of New York claiming that a constitutional question was involved, the Court of Appeals dismissed the appeal on the ground that no constitutional question was involved, the petitioners then petitioned the Court of Appeals for leave to appeal which was denied.

### **The Questions Involved.**

The petitioners' claim that there is a constitutional question is based upon their argument that only under Subdivision 18-a of Section 89 of the Village Law can the village acquire a public parking place and that since only that section gives the power that it must be construed to give to the village the further power to lease and license such parking places and apply the rental for general village purposes. The Courts below refused to so construe the statutes and held that the village had power under other statutes to acquire

such a public parking place and that the village held such lands in trust as a public parking place.

### **POINT ONE.**

#### **No constitutional question is involved.**

The petitioners' claim that a constitutional question is involved is predicated upon the false assumption that the village had no power to acquire a public parking place, except under Sub. 18-a of Section 89 of the Village Law and upon the further false assumption that such subdivision gives the village the right to lease such parking places and apply the revenue therefrom to the general funds of the village. The village claims no such right to lease, the New York Courts have found that no such right exists and that the village holds the land in trust for the purposes for which it was acquired. The interpretation placed upon the statutes and the law of New York as determined by the New York Courts precludes the very right which the petitioners claim is the basis for the violation of the constitution. The petitioners are attempting to thrust upon the village powers which it does not claim and which the New York Courts have found that it does not possess and then seek upon the basis of such alleged powers to claim a constitutional violation. Where the interpretation placed upon the New York Law by the New York Courts negatives the existence of the right which it is claimed violates the constitution, there is no constitutional question.

The petitioners did not appeal in the original condemnation proceeding in which the final order was

entered on August 2, 1943, but waited until March 19, 1945, to bring this action to collaterally attack the judgment of the County Court by seeking to vacate the assessments made pursuant to judgments thereof after the petitioners had had the opportunity to appear and protest under Article 14 of the Village Law and to take an appeal in the original condemnation proceeding. As was said by this Court in *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, at page 723:

“Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessments as unconstitutional.”

*McGregor v. Hogan*, 263 U. S. 234, 68 L. ed. 282;

*Utley v. St. Petersburg*, 292 U. S. 196, 76 L. ed. 1155;

*Farncomb v. City and County of Denver*, 252 U. S. 7, 64 L. ed. 424.

The courts of New York have consistently held, and Article 14 of the Village Law affords ample opportunity therefor, that upon an application for the appointment of Commissioners of Estimate and Assessment in a condemnation proceeding that all interested parties have an opportunity then to litigate the validity of the proceeding.

*Matter of Mayor*, 52 Misc. 592, affirmed 135 App. Div. 912, affirmed 198 N. Y. 606;

*Matter of City of Buffalo*, 64 N. Y. 547;  
*Matter of Niagara Falls and Whirlpool Rail-  
 way Co.*, 121 N. Y. 319;  
*Matter of Fowler*, 53 N. Y. 60;  
*Dolan v. Mayor, etc.*, 62 N. Y. 472.

## POINT TWO.

**No decision of a federal question was necessary in order to reach the decision sought to be reviewed.**

This action is a collateral attack upon judgments of the County Court of Nassau County and can only be sustained upon the grounds which would sustain such a collateral attack. It is an action in equity and there was an adequate remedy at law by making a motion in the County Court of Nassau County to vacate and set aside the judgments of the County Court and an appeal could have been taken from the decision thereon. The New York Courts could have refused relief upon the ground that there was an adequate remedy at law, that the case was *res adjudicata*, that the action was barred because of the failure of the petitioners to comply with Section 341-b of the Village Law, or upon the ground of laches.

We have only the decision of Judge Lockwood to guide us as to the reasoning of the New York Courts and after discussing the statutory provisions Judge Lockwood (at R. 22, fol. 32) dismissed any constitutional question by finding that the village did not hold the land in a proprietary capacity and that the land was acquired as a public parking space and must be held in trust for that purpose.

The fact that Judge Lockwood did not construe the federal constitution or any federal statute and that



the Appellate Division rendered no opinion shows that the decisions of the New York Courts were not based upon a federal ground.

*Walter A. Wood Mowing and Reaping Machine Co. v. Skinner*, 139 U. S. 293, 35 L. ed. 193;  
*Mellon v. O'Neil*, 275 U. S. 212, 72 L. ed. 245;  
*Lynch v. State of New York*, 293 U. S. 52, 79 L. ed. 191;  
*Brooklyn Park Commission v. Armstrong*, 45 N. Y. 234;  
*Williams v. Gallatin*, 229 N. Y. 248;  
*Matter of Ninth Avenue and Fifteen Street*, 45 N. Y. 732;  
*Lincoln S. D. Co. v. City of New York*, 210 N. Y. 37;  
*City of Whittier v. Dixon*, 24 California (2nd) 659.

## CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in granting their petition for certiorari in this case, and that therefore, the petition should be dismissed.

Respectfully submitted,

C. H. TUNNICLIFFE JONES,  
*Counsel for Respondent.*

GEORGE P. KRUG,  
*On the Brief.*



## APPENDIX A.

### Statutory Provisions.

Chapter 64 of the Consolidated Laws of the State of New York, being contained in Book 63 of McKinney's Consolidated Laws of New York, gives to the village the following powers:

Section 1-a, Sub. 1. To take, purchase, hold, lease, sell and convey such real and personal property as the purposes of the corporation may require.

Section 1-a, Sub. 5. To have and exercise all the rights, privileges and jurisdiction essential to a proper exercise of its corporate function, including all that may be necessarily incident to, or may be fairly implied from, the powers specifically conferred upon such corporation.

Section 1-a, Sub. 6. To have and exercise all the rights, privileges, functions and powers prescribed and exercised by it under existing or subsequent laws and not inconsistent with the provisions of this chapter.

The following subdivisions of Section 89 give power to the Board of Trustees to:

Sub. 3. Village Lands. May purchase, hold and convey real property in the name of the village . . .

Sub. 6. Sewerage and water supply systems; markets, libraries and public places generally. May lay out, establish and construct, maintain, continue, operate, alter, extend and discontinue sewerage and

drainage systems and water supply systems; and may lay out or continue to lay out, establish, construct, contribute to, maintain, manage and operate public buildings, markets, parks, playgrounds, libraries, hospitals and public places, and may lay out, establish and maintain parks and play-grounds at the expense of the owners of lands benefited thereby or partly at the expense of such owners and partly at the expense of the village at large, and upon discontinuance thereof may sell and convey the same subject to the limitations and restrictions provided in this chapter.

Sub. 9. Assessments; village maps. Subject to the provisions of existing law, may provide for the levying and levy assessments against property and may provide and establish a uniform system or method thereof and may provide for the creation of assessment areas; may provide for, cause to be made or revise maps of the village showing the various streets, highways, lots, parcels, sewers, hydrants, water pipes and all underground pipes and works of the village or any part thereof.

Sub. 18-a. Public hack stands and parking places. May purchase or lease lands or estates or interests in lands within its corporate limits for the establishment and maintenance of public hack stands or parking places for vehicles, may maintain, develop, and improve the same for such parking purposes and may lease and license the use of such lands or other estates or interests in lands, or any part thereof, for such term and at such annual rental, as it may determine. Lands or estates or interests in lands, as used in this subdivision, shall not be construed to include streets or public highways.

Sub. 35-a. Acquisition of lands. May acquire by purchase or by condemnation proceedings, any lands or rights needed or required for any municipal purpose.

Sub. 38. Assessment and collection of taxes; lien; refunds. Subject to existing law, and this chapter, may assess, levy and collect taxes on real and personal property within the village for the various purposes authorized or contemplated by this chapter and otherwise by law; may assess, levy and collect as a tax the charges or cost of all local improvements; if not otherwise provided in this chapter, may provide for the payment of the cost of any local improvement to or for the benefit of any property by assessment against such property and for the payment of such assessment; may declare and provide that the cost of all local improvements or of any other work or benefit to or for abutting property as determined by it, shall be a lien upon the property, which if not paid may be added to the village tax roll and collected as delinquent taxes as provided in this chapter; may refund moneys paid for taxes unlawfully levied.

Sub. 59. Promotion of public welfare. May take all measures, do all acts and enact any ordinances, not inconsistent with existing law which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, safety and health of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, the preservation and protection of the public streets, the preservation of public health, the prevention and extinguishment of fires and may generally exercise all the powers granted to the village.